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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AIRMAN FIRST CLASS ALDRICH C. MCCASTLE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

JOSEPH L. HEIMANN
Lt Colonel, United States Air Force
Chief Appellate Defense Counsel
Counsel for the Petitioner

Air Force Legal Services Agency
Appellate Defense Division
172 Luke Avenue, Suite 208
Bolling AFB, DC 20332-5113
(202) 767-1562

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QUESTION PRESENTED

Does a Defense Counsel's failure to raise a valid motion to suppress a confession, which would have resulted in the sole charge being dismissed, constitute ineffective assistance of counsel.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iv
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	5
AIRMAN ALDRICH McCASTLE RECEIVED A FEDERAL CONVICTION AND A BAD CONDUCT DISCHARGE BASED UPON EVIDENCE THAT ANY REASONABLE DEFENSE COUNSEL WOULD HAVE MADE A MOTION TO SUPPRESS	5
CONCLUSION	6
APPENDIX A	
Opinion of the United States Court of Appeals for the Armed Forces	1a
APPENDIX B	
Opinion of the United States Air Force Court of Military Review	8a

TABLE OF AUTHORITIES

Supreme Court Cases:	Page
Strickland v. Washington, 466 U.S. 668 (1984)	5
Kimmelman v. Morrison, 477 U.S. 365 (1986)	5
Military Cases:	
United States v. McCastle, 43 M.J. 438 (1996)	1, 4, 5, 6
United States v. McCastle, 40 M.J. 763 (A.F.C.M.R. 1992)	1, 4
Constitutional Provisions:	
U.S. Constitution Amendment IV	2
U.S. Constitution Amendment VI	2

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Airman First Class Aldrich C. McCastle, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 1 March 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 43 M.J. 438 (1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals reported at 40 M.J. 763 (AFCMR 1994), issued on 26 July 1994 is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 1 March 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the Constitution of the United States provides, in pertinent parts: "In all criminal prosecutions, the accused shall enjoy the right to . . . have Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On January 1993, the appellant was tried by a special court-martial composed of a military judge sitting alone at Robins AFB, Georgia. Contrary to his pleas he was found guilty of wrongful use of cocaine. He was sentenced to a bad conduct discharge and reduction to airman basic.

On 16 November 1992 the appellant was ordered to submit to a commander directed urinalysis. The sample was ordered as a "result of severe financial problems being experienced by AIC McCastle." On either 2 or 3 December 1992 the Robins AFB hospital was notified that the urine sample submitted by the appellant was

positive for the presence of Benzolegonine, a cocaine metabolite. Having learned of the positive urinalysis result the Staff Judge Advocate notified the Air Force Office of Special Investigations that the appellant would be administratively discharged from the Air Force unless a confession was obtained by the AFOSI and corroborated. At 1119hrs on 4 December 1992 three agents with the AFOSI began an interview with the appellant. All three agents were present throughout the interview.

The appellant was advised at 1119hrs that he was suspected of use of a controlled substance. At 1121hrs the appellant indicated he understood his rights and that he did not want a lawyer and was prepared to talk. The agent's notes reflect that the appellant confessed to ". . . purchasing one rock of cocaine from the Ashley Arms hotel and subsequent use of crack" at 1130hrs.

The same interview notes indicate the following sequence of events occurred in the nine minutes between waiver of the rights and the confession. Quoting from the notes:

> —Subject initially denied any involvement in use of narcotics.
>
> —Subject advised he did not know how urinalysis could have come back positive.
>
> —Subject finally admitted to using crack cocaine on 14 November 1992. Subject remembers date was 2 days prior to piss test.
>
> —Subject advise he had fight with spouse and went for a ride feeling depressed.

The notes continue on to explain the specifics of the actual one time purchase and use of crack. Finally, the notes indicate the appellant "swore it was [the] first and only time he ever used crack."

Using the confession the petitioner was prosecuted for the use of cocaine. His defense counsel never made a

motion to suppress the confession on the grounds that the confession was the direct product of the commander directed urinalysis.[1] On appeal, the petitioner contended that his trial defense counsel was ineffective in not making a motion to suppress this only substantive piece of evidence that existed against the petitioner.

In resolving this issue adversely to appellant, the Air Force Court of Criminal Appeals concluded that the trial defense counsel failed to raise the suppression motion because the defense counsel simply failed to understand applicable legal precedent and that was insufficient to constitute ineffective assistance of counsel. The Air Force Court went on to conclude that even though an "experienced advocate" would have recognized and raised the supression issue, "Ineffective assistance of counsel is not judged by the standard of what an experienced advocate would do. Rather, it requires errors so serious that counsel was simply not functioning as counsel" citation omitted. 40 M.J. at 768.

The Court of Appeals, in affirming the findings and sentence, found that the petitioner "failed to show the likelihood of a meritorious motion to suppress the confession as being tainted." 43 M.J. at 438. Judge Sullivan in dissent agreed with the Air Force Court in concluding that the petitioner had met the burden of proving that the confession was tainted but contrary to the Air Force Court concluded that the defense counsel's conduct amounted to ineffective assistance.

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[1] It is undisputed that Air Force Regulations prohibited the use of evidence derived from a commander-directed urinalysis for disciplinary action under the UCMJ and that this prohibition is grounded in the Fourth Amendment prohibition against unreasonable searches and seizures.

REASONS FOR GRANTING THE WRIT

AIRMAN ALDRICH McCASTLE RECEIVED A FEDERAL CONVICTION AND A BAD CONDUCT DISCHARGE BASED UPON EVIDENCE THAT ANY REASONABLE DEFENSE COUNSEL WOULD HAVE MADE A MOTION TO SUPPRESS

In reaching similar results the two lower Courts relied upon conflicting conclusions for their decisions. The Air Force Court acknowledged that a properly made suppression motion would have resulted in the confession being suppressed but concluded that the standard for ineffective counsel as provided by this Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) had not been met. The Air Force Court acknowledged this Court's decision in *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), that a "single serious error" alone may constitute ineffective assistance but concluded that standard had not been met.

On the other hand, the Court of Appeals for the Armed Forces completely sidestepped the issue by concluding that the petitioner had not met his burden of proving ". . . the likelihood of a meritorious motion to suppress the confession as being tainted" 43 M.J. at 440.

Petitioner submits that by granting this petition this Court will have the opportunity to define the parameters of both *Strickland, supra,* and *Kimmelman, supra.*

CONCLUSION

Judge Sullivan in his dissent notes that "[a]ppellant's confession was *the sole critical piece of evidence* in the prosecution's case; the issue of its admissibility was not clearly lacking in merit," and defense counsel's failure to litigate this question was not explained in strategic terms." *Citation omitted,* 43 M.J. at 440-441.

WHEREFORE, this Court should grant this petition.

Respectfully submitted,

JAY LINDSEY COHEN
Colonel, United States Air Force
Chief, Appellate Defense Division
Counsel of Record

JOSEPH L. HEIMANN
Lt Colonel, United States Air Force
Chief Appellate Defense Counsel
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